

HAWAII ADMINISTRATIVE RULES

TITLE 12

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS

SUBTITLE 8

DIVISION OF OCCUPATIONAL SAFETY AND HEALTH

PART 1

GENERAL, LEGAL, AND ADMINISTRATIVE PROVISIONS FOR OCCUPATIONAL SAFETY AND HEALTH

CHAPTER 51

INSPECTIONS, CITATIONS, AND PROPOSED PENALTIES

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Historical note: Chapter 51 of title 12 is based upon chapter 102 of the Hawaii Occupational Safety and Health Standards, Rules and Regulations. [Eff. 7/11/74; am 6/7/76; am 8/22/77; am 1/9/78; am 8/23/79; R 7/12/82]

§12-51-1 Purpose and scope. Every employer to which chapter 396, HRS, applies is required to furnish, to its employees, employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees. The law also requires that employers comply with occupational safety and health standards adopted under the law, and that employees comply with standards, rules, and orders issued under the law which are applicable to their actions and conduct. The law authorizes the department to conduct inspections and to question privately employers and employees in connection with investigation, enforcement and inspection activities. The law provides for adjudication of violations, periods prescribed for the correction of violations, and proposed penalties by the appeals board, if contested by an employer or by an employee, or designated representative of the employees, and

for judicial review. The purpose of this chapter is to prescribe rules and to set forth general policies for enforcement of the inspection, citation, and proposed penalty requirements of the law. In situations where this chapter sets forth general enforcement policies rather than substantive or procedural rules, the policies may be modified in specific circumstances where the director determines that an alternative course of action would better serve the objectives of the law. [Eff. 7/12/82; am 8/15/87] (Auth: HRS §396-4) (Imp: HRS §396-4)

§12-51-2 Posting of notice. (a) Each employer shall post, and keep posted, a notice made available by the division, informing employees of:

- (1) The protections and obligations under the law; and
- (2) The availability of assistance and information, including copies of the law and of specific safety and health standards, from the employer or the nearest office of the department.

(b) The notice shall be posted by the employer in each establishment in a conspicuous place where notices to employees are customarily posted. Each employer shall take steps to insure that notices are not altered, defaced, or covered by other material.

(c) Where distinctly separate activities are performed at a single physical location (such as contract construction activities from the same physical location as a lumber yard), each activity shall be treated as a separate physical establishment, and a separate notice shall be posted in each establishment, to the extent that the notices have been made available by the division. Where employers are engaged in activities which are physically dispersed (such as agriculture, construction, transportation, communications, and electric, gas, and sanitary services), the notice required by this section shall be posted at the location to which employees report each day. Where employees do not usually work at, or report to, a single establishment (such as longshoremen, traveling salespersons, technicians, and engineers), the notice shall be posted at the location from which the employees operate to carry out their activities. In all cases, the notice shall be posted in accordance with subsections (a) and (b) above.

(d) Copies of the law, all rules and standards adopted under the law, and all applicable standards are available through offices of the department. An employer shall obtain copies of these materials and shall make them available upon request to any employee, or their designated representative, for review in the establishment where the employee is employed on the same day the request is made or at the earliest time mutually convenient to the employee, or their designated representative, and the employer.

(e) Any employer failing to comply with this section shall be subject to citation and penalty in accordance with the law. [Eff. 7/12/82; am 8/15/87] (Auth: HRS §396-4) (Imp: HRS §396-4 and §396-6)

§12-51-3 Authority for inspection. (a) Safety and health compliance officers are authorized to enter without delay and at reasonable times any factory, plant, establishment, construction site, or any other area, workplace, or environment where work is performed by an employee of an employer. Officers may inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits, and in a reasonable manner, any place of employment, and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials. Officers may question privately any employer, owner, operator, agent, or employee and may review records required by the rules and standards, and other records which are directly related to the purpose of the inspection. Officers of the department are authorized to make inspections and to question employers and employees in order to carry out the functions of the director under the law. Inspections conducted by safety and health compliance officers and representatives of the director shall not affect the authority of any federal agency to conduct inspections in accordance with agreements under federal law.

(b) Prior to inspecting areas containing information which is classified by an agency of the United States Government in the interest of national security, safety and health compliance officers shall obtain the appropriate security clearance. [Eff. 7/12/82] (Auth: HRS §396-4) (Imp: HRS §396-4 and §396-6)

§12-51-4 Objection to inspection. (a) Upon a refusal to permit a safety and health compliance officer, in the exercise of official duties, to enter without delay and at reasonable times any place of employment or any place therein, to inspect, review records, or question any employer, owner, operator, agent, or employee, in accordance with section 12-51-3 or permit a designated representative of the employees to accompany the safety and health compliance officer during the physical inspection of any workplace, the safety and health compliance officer shall terminate the inspection or confine the inspection to other areas, conditions, structures, machines, apparatus, devices, equipment, materials, records, or interviews concerning which no objection is raised. The safety and health compliance officer shall endeavor to ascertain the reason for the refusal, and shall immediately report the refusal and the reason therefor to the director. The director shall promptly take action including compulsory process if necessary.

(b) Compulsory process shall be sought in advance of an attempted inspection or investigation if in the judgment of the director circumstances exist which make the pre-inspection process desirable or necessary. Some examples of circumstances in which it may be desirable or necessary to seek compulsory process in advance of an attempt to inspect or investigate include, but are not limited to, situations:

- (1) When the employer's past practice either implicitly or explicitly indicated that a warrantless inspection will not be allowed;
- (2) When an inspection is scheduled far from the local office and procuring a warrant prior to leaving to conduct the inspection would avoid, in case of refusal of entry, the expenditure of significant time and resources to return to the office, obtain a warrant, and return to the worksite; and
- (3) When an inspection includes the use of special equipment or when the presence of an expert or experts is needed in order to properly conduct the inspection, and procuring a warrant prior to an attempt to inspect would alleviate the difficulties or costs encountered in coordinating the availability of the equipment or expert.

(c) Ex parte inspection warrants shall be the preferred form of compulsory process in all circumstances where compulsory process is relied upon to seek entry to a workplace under this section. [Eff. 7/12/82; am 8/15/87] (Auth: HRS §396-4) (Imp: HRS §396-4)

§12-51-5 Entry not a waiver. Any permission to enter, inspect, review records, or question any person, shall not imply or be conditioned upon a waiver of any cause of action, citation, or penalty under the law. Safety and health compliance officers are not authorized to grant any waiver. [Eff. 7/12/82] (Auth: HRS §396-4) (Imp: HRS §396-4)

§12-51-6 Advance notice of inspections. (a) Advance notice of inspections may not be given, except:

- (1) In cases of apparent imminent danger, to enable the employer to abate the danger as quickly as possible;
- (2) In circumstances where the inspection can most effectively be conducted after regular business hours or where special preparations are necessary for an inspection;
- (3) Where necessary to assure the presence of representatives of the employer and employees or the appropriate personnel needed to aid in the inspection; and
- (4) In other circumstances where the director determines that the giving of advance notice would enhance the probability of an effective and thorough inspection.

(b) In the situations described in subsection (a) above, advance notice of inspections may be given only if authorized by the director, except that in cases of apparent imminent danger, advance notice may be given by the safety and health compliance officer without this authorization if the director is not immediately available. When advance notice is given, it shall be the employer's responsibility to promptly notify the designated representative of the employees of the inspection, if the identity of the representative is known to the employer. Section 12-51-8(b) shall apply to situations where there is no designated representative of the employees. Upon the request of the employer, the safety and health compliance officer shall inform the designated representative of the employees of the inspection, if the employer

furnishes the safety and health compliance officer with the identity of the representative and with other information that may be necessary to enable the officer to inform the representative promptly of the inspection. An employer who fails to comply with the obligations to promptly inform the designated representative of the employees of the inspection or to furnish information that is necessary to enable the safety and health compliance officer to inform the representative promptly of the inspection, may be subject to citation and penalty under the law. Advance notice in any of the situations described in subsection (a) above shall not be given more than twenty four hours before the inspection is scheduled to be conducted, except in apparent imminent danger situations and in other unusual circumstances and as otherwise required by the nature of the inspection. [Eff. 7/12/82; am 8/15/87] (Auth: HRS §396-4) (Imp: HRS §396-4 and §396-8)

§12-51-7 Conduct of inspections. (a) Subject to section 12-51-3, inspections shall take place at times and in places of employment as the director, the administrator, or the safety and health compliance officer may direct. At the beginning of an inspection, safety and health compliance officers shall present their credentials to the owner, operator, or agent in charge at the establishment, explain the nature and purpose of the inspection, and indicate generally the scope of the inspection and the records specified in section 12-51-3 which they wish to review. However, this designation of records shall not preclude access to additional records specified in section 12-51-3.

(b) Safety and health compliance officers may take environmental samples and take or obtain photographs related to the purpose of the inspection, employ other reasonable investigative techniques, and question privately any employer, owner, operator, agent, or employee of an establishment. The term "employ other reasonable investigative techniques" includes, but is not limited to, the use of devices to measure employee exposures and the attachment of personal sampling equipment (such as dosimeters, pumps, badges, and other similar devices) to employees in order to monitor their exposures.

(c) In taking photographs and samples, safety and health compliance officers shall take reasonable precautions to insure that actions with equipment (such as flash- or spark-producing equipment) will not be hazardous. Safety and health compliance officers shall comply with all employer safety and health rules and practices at the establishment being inspected, and they shall wear and use appropriate protective clothing and equipment.

(d) Inspections shall be conducted in a manner to preclude unreasonable disruption of the operations of the employer's establishment.

(e) At the conclusion of an inspection, the safety and health compliance officer shall confer with the employer or their chosen representative and informally advise either of them of any apparent safety or health violations disclosed by the inspection. During this closing conference, the employer shall be afforded an opportunity to bring to the attention of the safety and health compliance officer any information regarding conditions in the workplace.

[Eff. 7/12/82; am 5/28/83; am 8/15/87] (Auth: HRS §396-4) (Imp: HRS §396-4)

§12-51-8 Representatives of employers and employees. (a) Safety and health compliance officers shall be in charge of inspections and interviews. A representative of the employer and a designated representative of the employees shall be given an opportunity to accompany the safety and health compliance officer during the physical inspection of any workplace for the purpose of aiding an inspection. A safety and health compliance officer may permit additional employer representatives and additional designated representatives of the employees when the officer determines that the additional representatives will further aid the inspection. A different employer and employee representative may accompany the safety and health compliance officer during each different phase of an inspection if this will not interfere with the inspection.

(b) Safety and health compliance officers shall resolve all disputes as to whom is the representative authorized by the employer and employees for the purpose of this section. If there is no designated representative of the employees, or if the safety and health compliance officer is unable to determine with reasonable certainty who is the designated representative, the officer shall consult with a reasonable number of employees concerning matters of safety and

health in the workplace.

(c) The designated representative of the employees should be an employee of the employer. However, if, in the judgment of the safety and health compliance officer, good cause has been shown why accompaniment by a third party who is not an employee of the employer (such as an industrial hygienist or a safety professional) is reasonably necessary to conduct an effective and thorough physical inspection of the workplace, that third party may accompany the safety and health compliance officer during the inspection.

(d) Employee representatives are encouraged to participate in all phases of the enforcement proceedings. This includes the opening conference, walkaround inspection, closing conference, and the informal conferences with the administrator.

(e) Safety and health compliance officers are authorized to deny the right of accompaniment under this section to any person whose conduct interferes with a fair and orderly inspection. With regard to information classified by an agency of the federal government in the interest of national security, only persons authorized to have access to this information may accompany a safety and health compliance officer in areas containing this information. [Eff. 7/12/82; am 8/15/87] (Auth: HRS §396-4) (Imp: HRS §396-4 and §396-8)

§12-51-9 Trade secrets. (a) At the commencement of an inspection, the employer may identify areas in the establishment which contain or which might reveal a trade secret. If the safety and health compliance officer has no clear reason to question this identification, information obtained in those areas, including all negatives and prints of photographs and environmental samples, shall be labeled "confidential-trade secret" and shall not be disclosed except in accordance with the law.

(b) Upon request of an employer, the designated representative of the employees under section 12-51-8 in that area shall be an employee of the area containing trade secrets. Where there is no designated representative or employee, the safety and health compliance officer shall consult with a reasonable number of employees who work in that area concerning matters of safety and health. [Eff. 7/12/82; am 8/15/87] (Auth: HRS §396-4) (Imp: HRS §396-4 and §396-13)

§12-51-10 Consultation with employees. Safety and health compliance officers may consult with employees concerning matters of occupational safety and health to the extent necessary for the conduct of an effective and thorough inspection. During the course of an inspection, any employee shall be afforded an opportunity to bring any violation of the law which exists in the workplace to the attention of the safety and health compliance officer. [Eff. 7/12/82] (Auth: HRS §396-4) (Imp: HRS §396-4 and §396-8)

§12-51-11 Complaints by employees. (a) Any employee or their designated representative who believes that a violation of the law exists in any workplace where the employee is employed may request an inspection of the workplace by giving notice of the alleged violation to the director, the administrator, or to a safety and health compliance officer. The notice shall be written and state with reasonable particularity, the grounds for the inspection. It shall be signed by the employee or their designated representative. A copy shall be provided to the employer or to the employer's agent by the director, the administrator, or a safety and health compliance officer no later than at the time of inspection, except the complainant's name and the names of individual employees shall not appear on any record published, released, or made available by the department. In case of imminent danger situations, a phone call shall be sufficient to initiate inspection activity. In other cases, phone calls shall not be regarded as official complaints and may or may not be acted upon, at the discretion of the director.

(b) If, upon receipt of notification, the director determines that the notice meets the requirements in subsection (a) above and there are reasonable grounds to believe that the alleged violation exists, the director shall cause an inspection to be made as soon as practicable to determine if the alleged violation exists. Inspections made pursuant to this section shall not be limited only to matters in the complaint.

(c) Prior to or during any inspection of a workplace, any employee or designated representative of the employees employed in that workplace may notify the safety and health compliance officer in writing of any violation of the law which they have reason to believe exists in the workplace. Any notice shall comply with subsection (a) above.

(d) Any employee who believes that he or she has been unfairly discharged, suspended, or refused pay for time spent engaged in inspection related activities, or otherwise discriminated against by the employer for reasons relating to the employee's exercising of rights under the law, such as refusal to engage in unsafe work situations or for the filing of a complaint in accordance with subsection (a) above, may, within sixty days of the alleged act of discrimination, file a complaint, setting forth in detail the circumstances, with the department.

- (1) Upon receipt of a complaint, the department shall investigate, and if discrimination in violation of chapter 396, HRS, is found, shall initiate appropriate action against the employer.
 - (2) The director may extend the sixty day filing period on recognized equitable principles (i.e., where the employer has concealed, or misled the employee regarding the grounds for discharge or other adverse action) or where the discrimination is in the nature of a continuing violation.
 - (3) The pendency of a grievance-arbitration proceeding or filing with another agency, among others, are unqualifying circumstances to extend the sixty-day filing period.
- [Eff. 7/12/82; am 8/15/87; am 3/29/99] (Auth: HRS §396-4) (Imp: HRS §396-4 and §396-8)

§12-51-12 Inspection or Investigation not warranted; informal review. If the director determines that an inspection or investigation is not warranted because there are no reasonable grounds to believe that a violation or danger exists with respect to a complaint under section 12-51-11, the director shall notify the complaining party in writing of that determination. The determination shall be without prejudice to the filing of a new complaint meeting the requirements of section 12-51-11(a). The complaining party may obtain review of the determination by submitting a written statement of position with the director. Upon the request of the complaining party, the director may hold a redetermining hearing in which the complaining party may orally present his views. After considering all written and oral views presented, the director shall affirm or reverse the prior determination not to conduct an inspection or investigation and inform the complaining party of the decision and reasons. [Eff. 7/12/82; am 8/15/87; am 1/10/03] (Auth: HRS §396-4) (Imp: HRS §396-4 and §396-8)

§12-51-13 Imminent danger. When a safety and health compliance officer concludes, on the basis of an inspection, that conditions or practices exist in any place of employment which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of the danger can be eliminated through the enforcement procedures otherwise provided by the law, the officer shall inform the affected employees and employers of the danger. The officer shall also inform the affected employees and employers that he or she is recommending a civil action to restrain the employers from permitting the continuance of the dangerous conditions or practices in accordance with the law. Appropriate citations and notices of proposed penalties may be issued with respect to an imminent danger even though, after being informed of the danger by the safety and health compliance officer, the employer immediately eliminates the imminence of the danger and initiates steps to abate the danger. [Eff. 7/12/82; am 8/15/87] (Auth: HRS §396-4) (Imp: HRS §396-4)

§12-51-14 Citations. (a) The director shall review the inspection report of the safety and health compliance officer. If, on the basis of the report, the director believes that the employer has violated a requirement of the law, of any standard, rule, or order adopted under the law, or of any substantive rule published in this chapter, the director may consult with the attorney general and shall issue a citation to the employer. A citation shall be issued even though, after being informed of an alleged violation by the safety and health compliance officer, the employer immediately corrects or initiates steps to correct the alleged violation. Any

citation shall be issued by the department with reasonable promptness after completion of the closing conference stipulated by section 12-51-7(e).

(b) Any citation shall describe with particularity the nature of the alleged violation, including a reference to the law, standard, rule, or order alleged to have been violated. Any citation shall also fix a reasonable time for the correction of the alleged violation.

(c) If a citation is issued for a violation alleged in a request for inspection under section 12-51-11(a) or a notification of violation under section 12-51-11(c), a copy of the citation shall also be sent to the employee or the designated representative who made the request or notification. Also, if a complaint-initiated inspection did not reveal a violation, a notice shall be sent to the complainant.

(d) After an inspection, if the director determines that a citation is not warranted with respect to a danger or violation alleged to exist in a request for inspection under section 12-51-11(a) or a notification of violation under section 12-51-11(c), the informal review procedures in section 12-51-12(a) shall be applicable. After considering all views presented, the director shall uphold a prior determination, order a reinspection, or issue a citation, if it is believed that the inspection disclosed a violation.

(e) Every citation shall state that the issuance of a citation does not constitute a finding that a violation of the law has occurred unless there is a failure to contest or unless, if contested, the citation is affirmed by the appeals board.

(f) No citation may be issued to an employer because of a rescue activity undertaken by an employee of that employer with respect to an individual in imminent danger unless:

- (1) (A) The employee is designated or assigned by the employer to have responsibility to perform or assist in rescue operations, and
 - (B) The employer fails to provide protection of the safety and health of such employee, including failing to provide appropriate training and rescue equipment; or
- (2) (A) The employee is directed by the employer to perform rescue activities in the course of carrying out the employee's job duties, and
 - (B) The employer fails to provide protection of the safety and health of such employee, including failing to provide appropriate training and rescue equipment; or
- (3) (A) The employee is employed in a workplace that requires the employee to carry out duties that are directly related to a workplace operation where the likelihood of life-threatening accidents is foreseeable, such as a workplace operation where employees are located in confined spaces or trenches, handle hazardous waste, respond to emergency situations, perform excavations, or perform construction over water; and
 - (B) The employee has not been designated or assigned to perform or assist in rescue operations and voluntarily elects to rescue an individual; and
 - (C) The employer has failed to instruct employees not designated or assigned to perform or assist in rescue operations of the arrangements for rescue, not to attempt rescue, and of the hazards of attempting rescue without adequate training or equipment.
- (4) For purposes of this policy, the term "imminent danger" means the existence of any condition or practice that could reasonably be expected to cause death or serious physical harm before the condition or practice can be abated. [Eff. 7/12/82; am 8/15/87; am 1/26/96] (Auth: HRS §396-4) (Imp: HRS §396-4)

§12-51-15 Proposed penalties. (a) After or concurrent with the issuance of a citation, and within a reasonable time after the termination of the inspection, the director shall notify the employer by certified mail or by personal service by the safety and health compliance officer of the proposed penalty under the law. Any notice of proposed penalty shall state that the proposed penalty shall be the final order and not subject to review by any court or agency unless, within twenty calendar days from the date of receipt of notice, the employer files a notice of contest in accordance with section 12-51-19 for review of the order in accordance with the law.

(b) The director shall determine the amount of any proposed penalty, giving due

consideration to the appropriateness of the penalty with respect to the size of the business, the gravity of the violation, the good faith of the employer, and the history of previous violations in accordance with the law.

(c) Appropriate penalties may be proposed with respect to an alleged violation even though, after being informed of the alleged violation by the safety and health compliance officer, the employer immediately corrects or initiates steps to correct the alleged violation. [Eff. 7/12/82; am 8/15/87; am 8/10/95] (Auth: HRS §396-4) (Imp: HRS §§396-4, 396-10)

§12-51-16 Posting of citations. (a) Upon receipt of any citation under the law, the employer shall immediately post an unedited copy of the citation, at or near each place an alleged violation referred to in the citation occurred, except as specified in subsection (b) below.

(b) Where, because of the nature of the employer's operations, it is not practicable to post the citation at or near each place of alleged violation, the unedited citation shall be posted in a prominent place where it will be readily observable by all affected employees. For example, where employers are engaged in activities which are physically dispersed, the citation may be posted at the location to which employees report each day. Where employees do not primarily work at or report to a single location, the citation shall be posted at the location from which the employees operate to carry out their activities. The employer shall take steps to ensure that the citation is not altered, defaced, or covered by other material.

(c) A copy of each citation shall remain posted until the violation has been corrected, or for three working days, whichever is later. The filing by the employer of a petition to contest under section 12-51-19 shall not affect the employer's posting responsibility under this section unless and until the appeals board issues a final order vacating the citation.

(d) An employer who appeals a citation to the director shall post the petition for contest in the same location where the citation is posted, and the petition shall explain the reasons for the contest. The employer may also indicate that specified steps have been taken to correct the violation.

(e) Any employer failing to comply with this section shall be subject to citation and penalty in accordance with the law. [Eff. 7/12/82; am 8/15/87; am 8/10/95] (Auth: HRS §396-4) (Imp: HRS §§396-4, 396-10)

§12-51-17 Modification of correction period. (a) An employer may petition for a modification of the correction date when a good-faith effort to comply with the correction requirements of a citation has been made and when correction has not been completed because of factors beyond the reasonable control of the employer.

(b) The petition shall be postmarked or if not mailed, received by the director no later than the close of the next business day following the date on which correction is required. If not mailed, the date of receipt by the director shall be the date stamped on the petition by the director. The petition may be filed at a later date, if exceptional circumstances and good cause are shown.

(c) The written petition shall include:

- (1) All steps taken to achieve compliance within the correction period;
- (2) Specific additional time needed;
- (3) Reasons additional time is necessary;
- (4) Interim steps taken to safeguard employees against the cited hazards; and
- (5) Certification that a copy of the petition has been posted and, if appropriate, provided to the designated representative of affected employees.

(d) The petition shall be posted for ten days along with the original citation that was posted according to the requirements in section 12-51-16.

(e) The director shall issue an order either affirming or modifying the correction time requirement. [Eff. 7/12/82; am 8/15/87; am 8/10/95; am 11/16/96; am 4/11/98] (Auth: HRS §396-4) (Imp: HRS §396-4)

§12-51-18 Employee contests of correction period. (a) Any employee or their designated representative may file a written notice of contest of the initial correction period stated in a citation or order with the director alleging that the period of time fixed for correction is unreasonable, provided the notice is postmarked or if not mailed, received by the director within twenty calendar days after the citation or order has been posted. If not mailed, the date of receipt by the director shall be the date stamped on the contest by the director.

(b) Any employee or their designated representative may file a written notice of contest to an employer's petition for modification of the correction date or request an informal conference under section 12-51-21. However, failure to file this notice of contest which must be postmarked or if not mailed, received by the director within ten calendar days of the date of posting of the petition or of service upon a designated representative shall constitute a waiver of any further right to object to the petition. If not mailed, the date of receipt by the director shall be the date stamped on the contest by the director.

(c) The director shall advise the appeals board of a notice of contest upon receipt of any notice of contest.

(d) The appeals board shall afford an opportunity for a hearing on any notice of contest. The affected employees or their designated representatives shall be provided an opportunity to participate as parties to hearings on notices of contest.

(e) At any hearing on a notice of contest of an employer petition for a modification of the correction period, the employer shall have the burden of proving the requirements for a petition in section 12-51-17(a). [Eff. 7/12/82; am 8/15/87; am 8/10/95; am 11/16/96; am 7/10/97] (Auth: HRS §396-4) (Imp: HRS §§396-4, 396-10)

§12-51-19 Employer contests of citation, proposed penalty or both. Any employer to whom a citation and notice of proposed penalty has been issued may petition the director for review of the citation and notice pursuant to the rules of the appeals board within twenty days of the receipt by the employer of the notice of proposed penalty. Each notice of contest shall specify whether it is regarding the citation, the proposed penalty, or both. This petition shall be an original, and shall be served on the director and must be postmarked, or if not mailed, received by the director within twenty calendar days of the receipt by the employer of the citation and notice of proposed penalty. If not mailed, the date of receipt by the director shall be the date stamped on the contest by the director. The department will forward a copy of the petition to the appeals board. A de novo hearing shall be held by the appeals board. Copies of each contest petition shall be posted where they shall be readily observed by all affected employees. [Eff. 7/12/82; am 8/15/87; am 8/10/95; am 11/16/96] (Auth: HRS §396-4) (Imp: HRS §§396-4, 396-11)

§12-51-20 Failure to correct a violation. (a) If an inspection discloses that an employer has failed to correct an alleged violation for which a citation has been issued within the period permitted for its correction, the director may consult with the attorney general, and the director shall notify the employer, by certified mail or by personal service by a safety and health compliance officer, of the failure and of the additional penalty proposed under chapter 396-10, HRS, by reason of the failure.

(b) Any employer receiving a notification of failure to correct a violation and of the proposed additional penalty may petition the director to review the order pursuant to the rules of the appeals board. The petition must be postmarked or if not mailed, received by the director within twenty calendar days of the receipt by the employer of the notification of failure to correct a violation and of the proposed additional penalty. If not mailed, the date of receipt by the director shall be the date stamped on the contest by the director. Copies of each contest petition shall be posted where they will be readily observable by all affected employees and a copy shall be provided to their designated representative.

(c) Each notification of the failure to correct a violation and of the proposed additional penalty shall state that it shall be the final order and not subject to review by any

court or agency unless, within twenty calendar days from the date of receipt of the notification, the employer petitions in accordance with section 12-51-19, the director for review of the order in accordance with the law. [Eff. 7/12/82; am 8/15/87; am 8/10/95; am 11/16/96] (Auth: HRS §396-4) (Imp: HRS §§396-4, 396-10, 396-11)

§12-51-21 Informal conferences. At the request of an affected employer, employee, or their respective designated representative, the director may hold an informal conference for the purpose of discussing any issues raised by an inspection, citation, notice of proposed penalty, or notice of intention to contest.

- (1) If the conference is requested by the employer, an affected employee or their designated representative shall be afforded an opportunity to participate, at the discretion of the director.
- (2) If the conference is requested by an employee or their designated representative, the employer shall be afforded an opportunity to participate, at the discretion of the director.
- (3) Any party may be represented by counsel at the conference.
- (4) No informal conference or request for an informal conference shall operate as a stay of any twenty day period for filing a petition for appeal under section 12-51-19. [Eff. 7/12/82; am 8/15/87] (Auth: HRS §396-4) (Imp: HRS §396-4)

§12-51-22 Abatement verification. (a) Purpose. HIOSH's inspections are intended to result in the abatement of violations of the Hawaii occupational safety and health act. This section sets forth the procedures HIOSH will use to ensure abatement. These procedures are tailored to the nature of the violation and the employer's abatement actions.

(b) Scope and application. This section applies to employers who receive a citation for a violation of the Hawaii occupational safety and health law, chapter 396, HRS.

(c) Definitions.

- (1) Abatement means action by an employer to comply with a cited standard or regulation or to eliminate a recognized hazard identified by HIOSH during an inspection.
 - (2) Abatement date means:
 - (A) For an uncontested citation item, the later of:
 - (i) The date in the citation for abatement of the violation;
 - (ii) The final date established as a result of a petition for modification of the abatement date (PMA); or
 - (iii) The date established in a citation by an informal settlement agreement.
 - (B) For a contested citation item for which the Hawaii labor and industrial relations appeals board has issued a final order affirming the violation, the later of:
 - (i) The date identified in the final order for abatement;
 - (ii) The date computed by adding the period allowed in the citation for abatement to the final order date; or
 - (iii) The date established by a formal settlement agreement.
 - (3) Affected employees means those employees who are exposed to the hazard(s) identified as violation(s) in a citation.
 - (4) Final order date means:
 - (A) For an uncontested citation item, the twentieth calendar day after the employer's receipt of a citation;
 - (B) For a contested citation item:
 - (i) The thirtieth day after the date on which a decision or order of the Hawaii labor and industrial relations appeals board has been filed; or
 - (ii) The thirtieth day after the date on which an appropriate State court issues a decision affirming the violation.
 - (5) Movable equipment means any machine or device, powered or unpowered, that is used to do work and is capable of being moved within or between worksites.
- (d) Abatement certification.

- (1) Within five calendar days after the abatement date, the employer must certify to HIOSH that each cited violation has been abated, except as provided in paragraph (d) (2).
- (2) The employer is not required to certify abatement if the HIOSH compliance officer:
 - (A) Observes during the on-site portion of the inspection, within twenty four hours after a violation is identified, that abatement has occurred; and
 - (B) Notes in the citation that abatement has occurred.
- (3) The employer's certification that abatement is complete must include, for each cited violation item, in addition to the information required by paragraph (i), the date and method of abatement and a statement that affected employees and their representatives have been informed of the abatement.

Note to paragraph (d): Appendix A contains a sample abatement certification letter.

(e) Abatement documentation.

- (1) The employer must submit to HIOSH, along with the information on abatement certification required by paragraph (d) (3) of this section, documents demonstrating that abatement is complete for each wilful or repeat violation and for any serious violation for which HIOSH indicates in the citation that such abatement documentation is required.
- (2) Documents demonstrating that abatement is complete may include, but are not limited to, evidence of the purchase or repair of equipment, photographic or video evidence of abatement, or other written records.

(f) Abatement plans.

- (1) HIOSH may require an employer to submit an abatement plan for each cited violation (except an other-than-serious violation) when the time permitted for abatement is more than ninety calendar days. If an abatement plan is required, the citation must so indicate.
- (2) The employer must submit an abatement plan for each cited violation within twenty-five calendar days from the final order date when the citation indicates that such a plan is required. The abatement plan must identify the violation and the steps to be taken to achieve abatement, including a schedule for completing abatement and, where necessary, how employees will be protected from exposure to the violative condition in the interim until abatement is complete.

Note to paragraph (f): Appendix B contains a sample abatement plan form.

(g) Progress reports.

- (1) An employer who is required to submit an abatement plan may also be required to submit periodic progress reports for each cited violation. The citation must indicate:
 - (A) That periodic progress reports are required and the citation items for which they are required;
 - (B) The date on which an initial progress report must be submitted, which may be no sooner than thirty calendar days after submission of an abatement plan;
 - (C) Whether additional progress reports are required; and
 - (D) The date(s) on which additional progress reports must be submitted.
- (2) For each violation, the progress report must identify, in a single sentence if possible, the action taken to achieve abatement and the date the action was taken.

Note to paragraph (g): Appendix B contains a sample progress report form.

(h) Employee notification.

- (1) The employer must inform affected employees and their representative(s) about abatement activities covered by this section by posting a copy of each document submitted to HIOSH or a summary of the document near the place where the violation occurred.
- (2) Where such posting does not effectively inform employees and their representatives about abatement activities (for example, for employers who have mobile work operations), the employer must:
 - (A) Post each document or a summary of the document in a location where it will be readily observable by affected employees and their representatives; or
 - (B) Take other steps to communicate fully to affected employees and their representatives about abatement activities.
- (3) The employer must inform employees and their representatives of their right to examine and copy all abatement documents submitted to HIOSH.

- (A) An employee or an employee representative must submit a request to examine and copy abatement documents within three working days of receiving notice that the documents have been submitted.
- (B) The employer must comply with an employee's or employee representative's request to examine and copy abatement documents within five working days of receiving the request.
- (4) The employer must ensure that notice to employees and employee representatives is provided at the same time or before the information is provided to HIOSH and that abatement documents are:
 - (A) Not altered, defaced, or covered by other material; and
 - (B) Remain posted for three working days after submission to HIOSH.
- (i) Transmitting abatement documents.
- (1) The employer must include, in each submission required by this section, the following information:
 - (A) The employer's name and address;
 - (B) The inspection number to which the submission relates;
 - (C) The citation and item numbers to which the submission relates;
 - (D) A statement that the information submitted is accurate; and
 - (E) A signature of the employer or the employer's authorized representative.
- (2) The date of postmark by the United States Postal Service is the date of submission for mailed documents. For documents transmitted by other means, the date HIOSH file-stamps the document is the date of submission.
- (j) Movable equipment.
 - (1) For high gravity violations involving movable equipment, the HIOSH inspector shall attach a danger tag to the operating controls or to the cited component of equipment that is capable of being moved within the worksite or between worksites.
 - (2) Use of the cited component of equipment that has a danger tag attached is prohibited.
 - (3) For medium and lesser gravity violations the employer must use a warning tag or attach a copy of the citation to the operating controls or to the cited component of equipment that is capable of being moved within or between jobsites. The warning tag:
 - (A) must appropriately warn employees about the nature of the violation involving the equipment, and
 - (B) must identify the location of the citation issued.

Note to paragraph (j)(3): Attaching a copy of the citation to the equipment is deemed by HIOSH to meet the posting requirement of section 12-51-16. Non-Mandatory appendix C contains a sample tag that employers may use to meet this requirement.

- (4) If the violation has not already been abated, a warning tag or copy of the citation must be attached to the equipment immediately after the employer receives the citation for both hand-held and non-hand-held equipment.
- (5) For the construction industry, a tag that is designed and used in accordance with sections 12-110-2 and 12-119.1-1 is deemed by HIOSH to meet the requirements of this section when the information required by paragraph (j) (3) is included on the tag.
- (6) The employer must assure that the tag or copy of the citation attached to movable equipment is not altered, defaced, or covered by other material.

Note to paragraph (j)(6): A medium or lesser gravity violation is deemed by HIOSH to have been abated if the cited equipment has been removed from service by tagging it out-of-service or is no longer within the employer's control.

- (7) The employer must assure that the tag or copy of the citation attached to movable equipment remains attached until:
 - (A) A HIOSH inspector or authorized representative determines that the high gravity hazard has been abated and removes the tag; or
 - (B) The medium and lesser gravity violation has been abated and all abatement verification documents required by this regulation have been submitted to HIOSH; or
 - (C) The Hawaii labor and industrial relations appeals board or appropriate court issues a final order vacating the citation.

Note to paragraph (j)(7): If the employer believes that the gravity of the hazard has been reduced from the time of the inspection, the employer may notify HIOSH to conduct a re-inspection. If the inspector agrees that the gravity of the hazard has been reduced, the danger tag may be removed. In some cases, it may be replaced by the warning tag. If the tag issued was for a medium or lesser gravity violation, the employer may remove the warning tag simultaneously with notification to HIOSH that the cited violation has been abated.

Appendices to Section 12-51-22--Abatement Verification

Note: Appendices A through C provide information and nonmandatory guidelines to assist employers and employees in complying with the appropriate requirements of this section.

Appendix A to Section 12-51-22--Sample Abatement-Certification
Letter (Nonmandatory)

(Name), Director
Department of Labor and Industrial Relations-HIOSH
830 Punchbowl St. Room 423
Honolulu, Hawaii 96813-5017
[Company's Name]
[Company's Address]

The hazard referenced in Inspection Number [insert 9-digit #] for violation identified as: Citation [insert #] and item [insert #] was corrected on [insert date] by (how corrected - documentation required):

Citation [insert #] and item [insert #] was corrected on [insert date] by (how corrected - documentation required):

Citation [insert #] and item [insert #] was corrected on [insert date] by (how corrected - documentation required):

Citation [insert #] and item [insert #] was corrected on [insert date] by (how corrected - documentation required):

Citation [insert #] and item [insert #] was corrected on [insert. date] by (how corrected - documentation required):

Citation [insert #] and item [insert #] was corrected on [insert date] by (how corrected - documentation required):

Citation [insert #] and item [insert #] was corrected on [insert date] by (how corrected - documentation required):

Citation [insert #] and item [insert #] was corrected on [insert date] by (how corrected - documentation required):

I attest that the information contained in this document is accurate and that the affected employees and their representative(s) have been informed of the abatement activities mentioned above and of their right to examine and copy this and all other abatement documents submitted to HIOSH.

Signature & Title

Typed or Printed Name

Date

Appendix B to Section 12-51-22--Sample Abatement Plan or Progress Report (Nonmandatory)

(Name), Director
Department of Labor and Industrial Relations-HIOSH
830 Punchbowl St. Room 423
Honolulu, Hawaii 96813-5017

[Company's Name]

[Company's Address]

Check one:

Abatement Plan []

Progress Report []

Inspection Number
Page of

Citation Number(s)

Item Number(s)

Action	Proposed Completion Date (for abatement plans only)	Completion Date (for progress reports only)
1		
2		
3		
4		
5		
6		

Date required for final abatement:_____

I attest that the information contained in this document is accurate and that the affected employees and their representative(s) have been informed of the abatement activities mentioned above and of their right to examine and copy this and all other abatement documents submitted to HIOSH.

Signature & Title

Typed or Printed Name

Date

Name of primary point of contact for questions:
[optional]

Telephone number:_____
_____*Abatement plans or progress reports for more than one citation item may be combined in a single abatement plan or progress report if the abatement actions, proposed completion dates, and actual completion dates (for progress reports only) are the same for each of the citation items.

Sample Danger Tag

O

DANGER

**EQUIPMENT
USE
PROHIBITED**

EQUIPMENT CITED:

HAZARD CITED:

SEE HIOSH CITATION

**REMOVAL PROHIBITED
UNLESS AUTHORIZED BY HIOSH**

**BACKGROUND COLOR--RED
MESSAGE COLOR--BLACK**

[Eff. 10/23/97; am 4/11/98; am 3/29/99; am 1/10/03] (Auth: HRS §396-4) Imp: HRS §396-4)